VERIFICATION

COUNTY OF DUVAL }
STATE OF FLORIDA } ss.

Before me this day personally appeared FRANCIS M. HOLT, who having been first duly sworn did depose and say that he is counsel for Travelers Insurance Company, the Petitioner herein; that the matters and things alleged in the above and foregoing Petition for Writ of Certiorari are true and that in his opinion the said Petition is well founded in point of law.

FRANCIS M HOLT
FRANCIS M. HOLT.

Subscribed and sworn to before me

this 12 day of April, A. D. 1941.

MURIEL SCARBOROUGH
Notary Public.

SEAL

BRIEF IN SUPPORT OF PETITION

The final judgment and decree of the U. S. District Court (109) and the opinion of the U. S. District Court (100) contained certain findings of fact as will appear by reference to the record.

The opinion of the U. S. District Court is reported in 33 F. Supp. 117.

The opinion of the Circuit Court of Appeals was filed February 18, 1941 (137) and on the same date judgment was entered accordingly (142).

Petition for Rehearing was filed March 7, 1941 (144) and was denied March 20, 1941 (150). The opinion by the Circuit Court of Appeals has been reported in 117 Fed. (2) 646, and the various opinions and orders appear in the record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938, U.S.C.A. Title 28, Section 347 (a).

The propriety of an order by this Court granting the foregoing petition for writ of certiorari will find support in the following cases:

Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, in which judgment of the Circuit Court of Appeals for the Second Circuit was reversed.

Ruhlin vs. New York Life Insurance Company, 304 U. S. 202, 82 L. Ed. 1290, reversing judgment of the Circuit Court of Appeals for the Third Circuit.

Stringfellow vs. Atlantic Coast Line Railroad Company and *Atlantic Coast Line Railroad Com-*

pany vs. Stringwfellow, 290 U. S. 322, 78 L. Ed. 339, reversing judgment of Circuit Court of Appeals (Fifth Circuit) in 64 F (2) 173.

Ormsby, et al vs. Chase, 290 U. S. 387, 78 L. Ed. 378, reversing judgment of Circuit Court of Appeals (Third Circuit) which awarded new trial, 65 F (2) 521.

Travelers Protective Association of America vs. Prinsen, 291 U. S. 576, 78 L. Ed. 999, which affirmed judgment of District Court and reversed judgment of Circuit Court of Appeals (Tenth Circuit) awarding new trial, 65 F. (2) 841.

Eastman Kodak Company, et al vs. Gray, 292 U. S. 332, 78 L. Ed. 1291, affirming judgment of District Court and reversing judgment of Circuit Court of appeals (Third Circuit) 67 F. (2) 190.

ARGUMENT

The Circuit Court of Appeals in the majority opinion, concedes and recognizes the existence of the doctrine of continuing representations, as laid down by this Court in *Piedmont & Arlington Life Insurance Company vs. Ewing,* 92 U. S. 377, 23 L. Ed. 610, and *Stipcich vs. Metropolitan Life Insurance Company,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895, and approved by the Supreme Court of Florida in *Massachusetts Bonding & Insurance Company vs. Hoxie,* 129 Fla. 332, 176 So. 480. See the majority opinion of the Circuit Court of Appeals as it appears in the record (137-142).

Therefore, it must be assumed that if material statements as to matters of fact contained in the application were true on the date when Mr. Wilkins made those statements, if later, and before the insurance company acting upon the truth of the statements, issued the policies, the material statements as to matters of fact became untrue, their falsity would avoid liability under the insurance contract if the applicant failed to disclose the facts then within his knowledge and permitted the insurance company to change its position upon the faith of the application.

It therefore follows that at the time when the insurance contract was consummated, Mr. Wilkins stood in the position of representing to the insurance company that:

(a) He had never had fainting spells, vertigo or dizziness.

(b) He had never had disease of the heart.

(c) He had not consulted a physician since 1936 (more than three years before).

(d) His health was then good.

Admittedly, the insurance company had no knowledge of the falsity of the several statements.

Thus the case is reduced to simple form and may be stated as follows:

Point 1. Were the statements in the application to the effect that Mr. Wilkins had never had fainting spells, vertigo or dizziness or disease of the heart and that he had not consulted a physician since 1936, true or false?

Point 2. Were the statements known by Mr. Wilkins to be false?

Point 3. Did the statements constitute matters of fact rather than mere opinion?

Point 4. Under the law of Florida were the statements material?

Point 5. Under the law of Florida does false representation of material facts avoid liability under an insurance policy without conscious, fraudulent purpose to deceive?

POINT 1

Unquestionably the statements referred to were false at the time when the contract was consummated.

Moreover, the Trial Court found as a matter of fact that the statements were false (105 and 108).

The law of Florida is that findings of fact by the Chancellor will not be disturbed on appeal unless clearly erroneous.

That such rule is the law of Florida, see *Markell vs. Hilpert,* 140 Fla. 842, 192 So. 392.

That the Circuit Court of Appeals for the Fifth Circuit recognizes the existence of this rule as the law of Florida, see *Stevens vs. Edwards* (5 CCA) 112 F. (2) 534, wherein the rule is stated upon the authority of *Markell vs. Hilpert,* supra.

As has already been pointed out, there is no doubt but what the statements were false and the Circuit Court of Appeals did not question the findings of fact by the District Court.

POINT 2

It will not be contended that the falsity of the statements was unknown to Mr. Wilkins.

The District Court expressly so found (105 and 108).

Under the law of Florida these findings of fact by the District Court were binding upon the Appellate Court unless the findings were clearly erroneous and no such contention is made.

In addition to the authorities cited in Point 1, we could cite a vast number of decisions by the Supreme Court of Florida, but to do so would uselessly increase the volume of this brief.

We will content ourselves with a reference to a few recent decisions.

Citizens State Bank vs. Adams, 140 Fla. 578, 193 So. 281.

Smith vs. Stillman, 141 Fla. 312, 193 So. 63.

Tampa Theatre Building vs. City of Tampa, 141 Fla. 299, 193 So. 61.

Bond vs. Key, 141 Fla. 160, 192 So. 599.

POINT 3

Conceding that the question as to whether a person is in good health may call for an opinion, the fact remains that Mr. Wilkins knew that he had had a dizzy spell and a lump in his chest (5 and 54). He knew that he had consulted Dr. Swift, not once but five different times and had an electrocardiogram of his heart muscle made (5, 11, 55, 58, 75, 76, 86 and 87).

That such knowledge constitutes knowledge of matters of fact rather than matters of mere opinion, see *New York Life Insurance Company vs. McCarthy,* (5 CCA), 22 F (2) 241, Headnote 3 and text on page 244, *Mutual Life Insurance Company of N. Y. vs. Hurni Packing Company,* (8 CCA), 260 Fed. 641, Headnote 1 and supporting text.

The following is a quotation from an opinion rendered by the Fifth Circuit Court of Appeals in the case of *Aetna Life Insurance Company vs. Bolding,* (5 CCA), 57 F (2) 626:

"At the time of making his application for insurance Bolding was in the care of a physician, and only a few days before he had submitted to an X-ray examination. Although it might have been a matter of opinion with him as to whether he was suffering from any ailment or disease, he knew that he was then consulting physicians for some one or more of the diseases mentioned in the list of questions he was required to answer. Those questions were not limited generally to diseases of the stomach or intestines, but they referred specifically to 'any other disease or illness'; and consequently called for information from him as to any consultation with his physicians concerning a disease of the gall bladder, regardless of whether in his opinion he was suffering from such an ailment or disease."

POINT 4

There is no doubt but what the false statements were material.

The Petitioner's witness, Laurence P. Allison, after testifying that he had no knowledge of the symptoms experienced by Mr. Wilkins and his consultations with and treatment by Dr. Swift, testified further that if he had had knowledge or information of the existence of the things mentioned he would not have approved the issuance or the release of the policies without further investigation and consultation with the medical department of the company (41).

The witness further testified that he was familiar with the customs and usages of life insurance companies generally, and that under such custom insurance companies generally, having knowledge of the impairments mentioned, would not have accepted the application without further investigation and further consultation with their medical departments (42).

Mr. Allison was the assistant secretary of the insurance company in whose department and under whose supervision the application in the instant case was handled.

To the same effect is the testimony of Raymond W. Southergill, assistant underwriter of the company, who personally handled the transaction (44, 45).

Dr. William W. Dinsmore, assistant medical director of the company, testified to the same effect (47).

This having been established without contradiction in the record, it is clear that the misrepresentations were as a matter of law, material, and under the terms of the contract invalidated the policies.

Under the law of Florida factual representations such as those under discussion are material as a matter of law. See *Thompson vs. New York Life Insurance Company,* 143 Fla. 534, 197 So. 111, from which we quote:

> "The chief medical director who approved the insured's application testified in effect that had he known her real medical history, he would have rejected her application and he also testified that reputable insurance companies generally would have done so."

The opinion by the Florida Court closes with the following statement:

> "An insurance company is not bound to accept any risk that is offered. It may exercise its discretion and its judgment as to whether or not it will issue a policy of insurance upon the life of any particular individual. Before it reaches a conclusion it is entitled to have such information as it may desire in regard to the health, habits and physical condition of the applicant. It is the duty of an applicant for insurance to answer truthfully the questions which he assumes to answer and which are to become a part of his application and of the insurance contract. Whether or not these questions and answers disclose facts material to the risk are matters for the insurer to determine and it can only reach a fair determination when furnished with truthful answers."

In the later case of *Winer vs. New York Life Insurance Company,* 143 Fla. 652, 197 So. 487, the Supreme Court of Florida said:

> "In the instant case the insured concealed the fact that he had consulted a physician, and as a consequence the insurer made no investigation. If the insured

had truthfully answered the questions, the insurer would thereby have been supplied the data and means of discovering the true condition of the insured's health."

* * * *

"A positive statement of fact, falsely made with respect to a material matter, will, nothing else appearing, be deemed to have been made willfully and with intent to deceive. It is only when the consultation and treatment relates to such temporary disorders or ailments as do not conflict with the definition of good or sound health as given above that negative answers to questions of this character can be disregarded as immaterial. See *Mutual Life Ins. Co. of New York v. Hurni Packing Co.,* (8 Cir.) 260 Fed. 641, 171 C. C. A. 405; *Mutual Life Ins. Co. v. Hilton-Green,* 241 U. S. 613, 622, 36 S. Ct. 676, 60 L. Ed. 1202; *Plumb v. Penn Mutual Life Ins. Co.,* 108 Mich. 94, 65 N. W. 611. If the answer is untrue, and the matter is material, and the maker of the statement necessarily knows that it was not true when he made it, the intention to deceive the insurer is necessarily implied as a consequence of such act. See *Mutual Life Ins. Co. v. Hurni Packing Co., supra,* 260 Fed. 646, 171 C. C. A. 405; *Claflin v. Commonwealth Ins. Co.,* 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76."

In closing the opinion the Supreme Court of Florida said:

"Had the insured truthfully answered the questions the insurer would thereby

have been supplied with data and means of discovering the condition of insured's health. This unmistakably was his duty in the exercise of good faith in his application for reinstatement of the policy."

POINT 5

The Circuit Court of Appeals for the Fifth Circuit has expressly recognized that the law of Florida is as we have stated it to the effect that representations in an application for life insurance wherein the applicant falsely stated that he had not within the past five years consulted or been treated by physicians were material as a matter of law.

The case to which we refer is *Metropolitan Life Insurance Company vs. Madden,* 117 F. (2) 446, from which the following quotation is taken. In making the statement quoted below the Circuit Court of Appeals cited as authority the Florida cases of *Thompson vs. New York Life Insurance Company* and *Winer vs. New York Life Insurance Company, supra.*

> "The answer sought to be elicited by the question was an answer of fact and not of opinion. If it was not material, its falsity was wholly unimportant, but if, as here, it was material as matter of law, and, as here, the answer was, and was known to be, untrue, its giving prevented recovery on the policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive."

Inasmuch as the representations in the application were representations of fact and not matters of mere opinion; and inasmuch as the representations were material to the risk; and inasmuch as the representations were false; and inasmuch as the representations were known by the applicant to be false at the time when the contract was consummated, it follows that such false representation of material facts will invalidate these insurance policies without proof of actual, conscious design to defraud.

The rule of law embraced in the foregoing statement has been expressly recognized and approved by the Supreme Court of Florida in the case of *New York Life Insurance Company vs. Kincaid,* 122 Fla. 283, 165 So. 553, text page 559, from which we quote:

> "It is also academic that failure by the one insured to disclose conditions material to the risk of which he is aware make the contract voidable at the insurer's option. This principle is well settled and is approved by this court."

The stated rule is the law of Florida today and the Kincaid case, as to this particular point, has been cited by the Supreme Court of Florida as late as August 2, 1940, in the case of *Winer vs. New York Life Insurance Company, supra.*

That such rule of law as applied to Florida life insurance contracts is approved by this Court, see *Mutual Life Insurance Company vs. Hilton-*

Green, 241 U. S. 613, 36 S. Ct. 676, 60 L. Ed. 1202, from which we quote the first headnote:

> "1. Material incorrect representations in the application for a policy of life insurance, which is made an essential constituent of the policy, if known to be untrue by the assured when made, invalidate the policy without further proof of actual, conscious design to defraud."

CONCLUSION

For the reasons stated in this petition and in this brief, it is respectfully submitted that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

FRANCIS M. HOLT,
Counsel for Petitioner.

SAM R. MARKS,
HARRY T. GRAY,
of Counsel for the Petitioner.